Supreme Court, U.S.
FILED
06-159 JUL 27 2006
OFFICE OF THE CLERK

(2)

No.

IN THE
SUPREME COURT OF THE UNITED STATES

CULPEPPER & CARROLL, PLLC
Petitioner,

v.

CONNIE D. COLE,
Respondent.

ON APPLICATION FOR
WRITS OF CERTIORARI AND/OR
WRITS OF REVIEW OF THE
SUPREME COURT OF THE
STATE OF LOUISIANA,
WHICH DECISION REVERSED
A DECISION OF THE
COURT OF APPEAL, SECOND CIRCUIT,
STATE OF LOUISIANA

APPENDIX TO PETITION FOR WRITS OF CERTIORARI AND/OR WRITS OF REVIEW

BOBBY L. CULPEPPER*
TERESA C. CARROLL
J. CLAY CARROLL
525 East Court Avenue
Jonesboro, LA 71251
318/259-4184

* Counsel of Record

Attorneys for Petitioner

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LOUISIANA ATTORNEY DISCIPLINARY BOARD
OFFICE OF THE DISCIPLINARY COUNSEL
4000 S. Sherwood Forest Blvd.
Suite 607
Baton Rouge, Louisiana 70816
(225) 293-3900 * 1-800-326-8022 * FAX (225) 293-3300
April 30, 2003

Bobby L. Culpepper, Esq.
525 E. Court Street
Jonesboro, LA 71251-3437

Re: Respondent: Bobby L. Culpepper
Complainant: Connie Daniel Cole
File No.: 0015341

Dear Mr. Culpepper:

The Office of Disciplinary Counsel has completed its investigation in the above captioned matter. It is our determination that there is not clear and convincing evidence to support the complainant's allegations of unethical conduct against you. Accordingly, we have dismissed this complaint.

Under Supreme Court Rule XIX, Sec. 11B(3), the complainant has the right to request an independent review of this decision. If a review is requested which results in this matter being reopened, you will be advised. Otherwise, you may consider this matter concluded.

Thank you for your cooperation in this matter.

Sincerely,
Signed by Robert S. Kennedy, Jr.
Robert S. Kennedy, Jr.
Deputy Disciplinary Counsel

RSK/dj

LOUISIANA ATTORNEY DISCIPLINARY BOARD
OFFICE OF THE DISCIPLINARY COUNSEL
4000 S. Sherwood Forest Blvd.
Suite 607
Baton Rouge, Louisiana 70816
(225) 293-3900 * 1-800-326-8022 * FAX (225) 293-3300
April 30, 2003

Connie Daniel Cole
P. O. Box 193
Grambling, LA 71245

Re: Respondent: Bobby L. Culpepper
Complainant: Connie Daniel Cole
File No.: 0015341

Dear Mr. Cole:

After evaluating your complaint and the response of the attorney, it is our decision that no formal disciplinary action is appropriate. We have reviewed your allegations in light of an attorney's obligations as outlined in the Rules of Professional Conduct. We find no clear and convincing evidence that a violation of the Rules has occurred. Therefore, we are dismissing your complaint. We will nonetheless maintain a copy of your complaint on file for a period of three (3) years.

You have the right to file a written request for review of this decision by a hearing committee. If you want this review, you must file a written request with our office within thirty (30) days of the receipt of this letter. You should state in detail what ethical misconduct you believe was committed by the attorney and what evidence you have submitted to establish this misconduct.

We appreciate your concern for the maintenance of professional standards by all attorneys practicing law in our state.

Sincerely,

Signed by Robert S. Kennedy, Jr.
Robert S. Kennedy, Jr.
Deputy Disciplinary Counsel

RSK/dj
cc: Bobby L. Culpepper

Succession of Annie Ruth
Conley Cole Brown

Connie Daniel Cole, Plaintiff-Appellant
v.
Maud C. Osborne and Karl L. Cole,
Defendants-Appellees

No. 39,035-CA

Court of Appeal of Louisiana,
Second Circuit

Oct. 27, 2004

Rehearing Denied Dec. 9, 2004

Connie Daniel Cole, In Proper Person.
Cliffe Charles LaBorde, III, Baton Rouge for Appellees.

Before Williams, Caraway and Lolley, J.J.

Lolley, J.

In this contested will case, Connie Daniel Cole ("Connie") appeals a judgment in the First Judicial District Court, Parish of Caddo, State of Louisiana, which refused to invalidate the last will and testament of Annie Ruth Conley Cole Brown ("Brown"). For the following reasons, we affirm.

Facts

Brown executed her last will and testament (the "will") on August 18, 1999 and died on September 7, 1999. In the will, Brown identified the following children as having been born of her marriage to Connie Dan Cole: Maud Osborne ("Maud"), Connie, Karl Cole ("Karl"), and Jason Cole

("Jason"). In the will, she further stated that no other children had been born to her and that she had not adopted anyone; however, it is disputed that Jason was adopted. Brown's will made specific bequests of immovable property to Jason and Connie, with the remainder of Brown's property going to Maud and Karl.

In June 2000, Maud and Karl attempted to have the will executed and to have a judgment of possession entered. However, Connie refused to either accept or renounce his legacy, and over the next several years he was involved in a dispute with the other legatees over Brown's succession. In January 2004, Karl, as executor of the succession, filed a rule to compel Connie to either accept or renounce his legacy, to compel assertion or dismissal of claims, and to compel a relinquishment of certain succession property. Subsequently, the trial court held a hearing on the rule at which Connie appeared in proper person. Connie pointed out that Jason, contrary to the provisions of the will, was adopted, and he questioned whether the error in the will could be evidence that Brown "could have not really know exactly what she was doing." He also pointed out that Jason's birth date in the will had been manually changed from 1974 to 1973, and that Brown had erroneously signed her name as "Annie R.R. Brown" in one instance in the will.

Opposing counsel pointed out that the will was in valid notarial form and that the introductory clause concerning the information on the children born of the marriage was "biographical information" that was not a necessary component of the will. Although opposing counsel recognized the somewhat "awkward state" he was in as the lawyer before whom the will was executed, he recalled that the changed birth date for Jason was made by the testatrix who, after reviewing the will, recognized that Jason was born in 1973 instead of 1974. It was acknowledged that Jason was an adopted child, but argued that the contrary statement

was in a portion of the will that did not go to its validity. Finally, the additional "R" in Brown's signature was acknowledged, but it was argued that the additional initial also did not go to the validity of the will.

After listening to what the trial court referred to as Mr. Cole's "testimony," the trial court stated that the will was self-proving and that the evidence presented was insufficient to successfully challenge the will. The trial court specifically noted that Brown seemed to have the presence of mind to correct a birth date. The trial court then required Connie to either accept or renounce his legacy. Connie accepted the legacy, but indicated that he wished to appeal the judgment, and this appeal ensued.

Discussion

On appeal, Connie argues that the will should have been invalidated because of the error concerning Jason who, contrary to the will's introductory clause, was not a children born of the marriage, but was an adopted child. Connie argues that Brown's signing a testament "with the incorrect number and relationship to the parties suggests an abnormality or disordered reason or insanity . . ."

Initially, we note that the error concerning Jason is not, by itself, the kind of error that would invalidate a will. Brown obviously intended, through her will, to make a donation *mortis causa* by which she would dispose of all of her property. Brown had four children, one of whom was adopted, and she logically elected to divide her property among those children. She did so through a testament, properly executed, in a form authorized by law. Accordingly, the only way the erroneous statement in the introductory cause of the will could invalidate it would be if the statement constituted clear and convincing evidence that Brown lacked testamentary capacity.

[1,2] All persons have capacity to make and receive donations *mortis causa*, except as expressly provided by law. La. C.C. Art. 1470; *In re Succession of Miller*, 35,244 (La.App.2dCir. 12/07/01), 803 So. 2d 1021, *writ denied*, 2002-0559 (La. 04/26/02), 814So.2d560. To have capacity to make a donation *mortis causa*, a person must be able to comprehend generally the nature and consequences of the disposition that he is making. La. C.C. Art. 1477. There is a presumption in favor of mental capacity and a party alleging lack of capacity must overcome the presumption by clear and convincing evidence. *Succession of Dodson*, 27,969 (La.App.2dCir.02/28/96) 669 So.2d 642. In will contest cases, the factual findings of the trial court are given great weight and will not be disturbed on appeal in the absence of manifest error. *In re Succession of Davis*, 35,217 (La.App.2d Cir.10/31/01), 799 So.2d 1194.

In *Succession of Launius*, 503 So.2d 682 (La.App.3dCir.1987), *writ denied*, 505 So.2d62 (La.04/23/87), a testator's daughter sought to annul the testator's last will and testament for lack of testamentary capacity. The appellate court affirmed the trial court's determination that the daughter failed to establish by clear and convincing evidence that the testator lacked capacity even though a psychiatrist, described by the court as the daughter's most favorable witness, had stated that the testament showed signs of unsoundness of mind. The psychiatrist noted that the will referred to the testator's sister as his "next of kin," but that most people would consider their only child to be their nearest of kin. The psychiatrist

---

1. Although the rule before the trial court also included a request for Connie's relinquishment of certain immovable succession property, the trial court did not resolve that matter because counsel for the succession indicated a willingness to have a survey of the property made and to then further, consider Connie's position on that matter.

indicated this was significant because the testator had carried on extended correspondence with his daughter and had expressed deep affection for her, but had failed to include her in his testament.

[3] In the instant case, Brown included all of her children in her will and, as pointed out by the trial court, had the presence of mind to correct the erroneous birth date given for Jason in the will. Given these factual circumstances, we cannot conclude that the trial court was manifestly erroneous in finding that appellant failed to prove testamentary incapacity by clear and convincing evidence. Instead, we conclude the trial court's decision is quite sound. Accordingly, the judgment of the trial court is affirmed at Connie Daniel Cole's costs.

AFFIRMED.

APPLICATION FOR REHEARING Before Williams, Caraway, Peatross, Drew, and Lolley, J.J. Rehearing denied.

CULPEPPER & CARROLL, PLLC	: RUSTON CITY COURT
VS. NO. 32,421	: PARISH OF LINCOLN
CONNIE D. COLE	: STATE OF LOUISIANA

JUDGMENT

IN THIS MATTER, petition and answer having thereto been filed; said petition having come on for hearing on this date; the law and the evidence being in favor of plaintiff and against defendant for reasons this day orally assigned:

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the judgment herein be granted and that there be judgment herein in favor of plaintiff, CULPEPPER & CARROLL, PLLC and against the defendant, CONNIE D. COLE, in the full and true sum of SIX THOUSAND, NINE HUNDRED FIFTY AND 01/100 ($6,950.01) DOLLARS, plus legal interest from date of judicial demand until paid, together with twenty-five per cent (25%) additional on both the principal and interest as attorney's fees and for all costs of these proceedings.

JUDGMENT RENDERED, SIGNED AND FILED at Ruston, Lincoln Parish, Louisiana, on this the 14th day of July, 2004.

_____

JUDGE

STATE OF LOUISIANA
COURT OF APPEAL, SECOND CIRCUIT
430 Fannin Street
Shreveport, LA 71101
(318)227-3700

Wanda W. Neeles
Clerk, Ruston City Court
P. O. Box 1821
Ruston, LA 71273-1821

Danny W. Tatum
Judge, Ruston City Court
P. O. Box 1821
Ruston, LA 71273

Bobby L. Culpepper
Culpepper & Carroll, PLLC
525 East Court Avenue
Jonesboro, LA 71251-3497

Connie Daniel Cole
In Proper Person
163 South Pine Tree Road
Grambling, LA 71245

NOTICE OF JUDGMENT AND
CERTIFICATE OF MAILING

March 9, 2005

Docket Number: CA 04-39438

CULPEPPER & CARROLL, PLLC
VERSUS
CONNIE D. COLE

NOTICE IS HEREBY GIVEN that the attached judgment and written opinion was rendered this date and a copy was mailed to the trial judge, the trial court clerk, all counsel of record and all parties not represented by counsel as listed above.

FOR THE COURT

Diana Pratt-Wyatt
Clerk of Court

Judgment rendered March 9, 2005
Application for rehearing may be filed
within the delay allowed by art. 2166,
La. C.C.P.

No. 39,438-CA
COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

CULPEPPER & CARROLL, PLLC Plaintiff-Appellee
Versus
CONNIE D. COLE Defendant-Appellant

Appealed from
Ruston City Court
Parish of Lincoln, Louisiana
Trial Court No. 32,421
Honorable Danny W. Tatum, Judge

CONNIE DANIEL COLE Pro Se
CULPEPPER & CARROLL, PLLC Counsel for Appellee
By: Bobby L. Culpepper

Before Caraway, Peatross & Moore, JJ.

Caraway, J., dissents with written reasons.

PEATROSS, J.

In this dispute over attorney's fees under an alleged contingent fee contract, Defendant, Connie D. Cole, proceeding *pro se* in this appeal, argues that insufficient evidence existed to support the trial court's decision to award Plaintiff, Culpepper & Carroll, PLLC, the sum of $6,950.01, plus legal interest, together with an additional 25 percent on principal and interest as attorney's fees. For the following reasons, the judgment of the trial court is amended and, as amended, affirmed.

FACTS

On April 12, 2004, Culpepper & Carroll, PLLC ("Culpepper"), filed a petition on open account in Ruston City Court against Connie D. Cole ("Cole") seeking $6,950.01, plus legal interest, together with an additional 25 percent on both the principal and interest as attorney fees. Attached to the petition were a November 12, 2003 demand letter and a November 3, 2003 invoice in the amount of $6,950.01 for attorney fees in connection with a matter entitled "Succession of Annie Ruth Brown." The invoice indicated that the balance due was calculated by taking one-third of $21,600.03 and subtracting from it a $250 credit, representing advance court costs paid by Cole. Evidence adduced at the subsequent trial showed that the $21,600.03 represented the amount of a settlement that Culpepper had negotiated with opposing counsel in the succession matter in which Culpepper represented Cole. Thus, the $6,950.01 represented a fee Culpepper claimed had been earned pursuant to a contingent fee contract entered into between Culpepper and Cole.

Cole filed an answer stating that "Mr. Culpepper did this on a contingency fee basis," that Culpepper "quit the case" and that Cole paid Culpepper for court costs, but Culpepper "would not go to court." In a written explanation of his answer, Cole admitted that he consulted with Culpepper on the succession of Annie Ruth Brown, but Cole asserted that he refused any more consultation from Culpepper and pursued the case on his own behalf. He stated that the settlement amount that Culpepper had attempted to get Cole to accept left Cole "feeling as if his counsel was unfaithful and leaving him virtually unrepresented." Cole attached to his answer a copy of a letter from Culpepper to Cole dated September 20, 2000. The letter indicated that Culpepper would handle Cole's legal representation in the succession of Annie Ruth Brown on a contingent fee basis for "one-third of

whatever additional property or money we can get for you." The letter also acknowledged that Cole had already advanced $250 for estimated court costs. The letter then discussed legal issues that Culpepper considered pertinent in the matter, noted that the net value of the estate was $183,000 and indicated that Culpepper considered one-eighth, or $22,900, to be the maximum Cole could get if Cole could be considered a forced heir. Thus, Culpepper's letter indicated to Cole that, since Cole already had received $2,500 in value, $20,400 would be the maximum amount Cole could expect to win in the case.

In addition, the letter indicated that Culpepper probably could get opposing counsel to recommend a settlement to his clients, although they obviously would not pay the entire amount because the law was unclear concerning forced heirship issues under the facts of this case.

When the matter came on for trial on July 14, 2004, counsel for Culpepper first called Cole as an adverse witness. Cole generally was unresponsive as a witness, but did make some critical admissions. Cole admitted that, under the "so-called" will, Cole would have received $2,500 in land, and Cole remembered Culpepper "saying something about if I got a one-eighth interest, but you also told me I didn't qualify for that." Cole then was asked if his counsel had informed him that the estate was willing to pay Cole an additional $21,603 in real estate. Cole responded affirmatively, but stated that he was unsatisfied with that figure. Cole testified as follows regarding the contingent fee agreement:

> Q: (by Culpepper) Okay, but when you came to see me, you didn't have money to pay on an hourly basis. You wanted me to charge a contingent fee of one-third of whatever additional amount of money I could get the people to agree to pay you voluntarily or through court, did you not?

A. (Cole) On, on a -- uh, we agreed on a contingence fee.

Cole was then asked if he had given counsel the authority "to go ahead and make the best settlement that we could" based upon counsel's opinion that if the case went to trial, Cole would lose and would get no more money. Cole responded, "[t]hat's based on your opinion, but on my opinion, I believe that, uh, I would get more."

When asked if Cole had terminated his counsel's services, Cole responded that he did not know, but that he has asked counsel "off of the case." Cole also admitted reporting his counsel to the Bar Association after counsel "quit," and that, after retaining new counsel, Cole eventually reported him to the Bar Association as well. Cole also admitted reporting the attorney representing the estate to the Bar Association.

Finally, when asked if he had received a certified letter demanding payment of the $6,950.01, Cole indicated that he received a certified letter, but stated, "I don't exactly recall what was on the certified letter . . ."

The next witness was Bobby Culpepper of the plaintiff law firm. Culpepper indicated that Cole had first contacted his office in 2000 to complain about Cole's mother's will which had left him only $2,500. According to Culpepper, Cole felt that he should be a forced heir, and there was some discussion concerning whether the forced part would be one-eighth or less than one-eighth. Culpepper testified that he concluded Cole's share probably would be less than one-eighth; but, if Cole received one-eighth of the estate, his share would have been $22,900, so that when the $2,500 was subtracted, Cole stood to get an additional $20,400. Culpepper testified that, after doing substantial research, he determined that Cole could not win. According to Culpepper, Cole "authorized me, at that time, to work out the best settlement that we could work out."

Culpepper then negotiated a settlement in which Cole would get property worth an additional $21,600, which was more than Cole would get if he had been able to establish that he was a forced heir. Culpepper, however, testified that, when the time came to sign settlement papers, Cole would not sign. Culpepper then informed Cole that, because Culpepper did not think Cole could win the case, Culpepper was not going to litigate something "that I felt could not be won and particularly when we were getting more than we would get if we won." Culpepper then sent Cole certified demand letters seeking the $6,950.01 representing one-third of the additional value of the property which Cole would have received if he had accepted his counsel's recommendation. The court asked Mr. Culpepper if there was a written contract for the contingent fee agreement. Mr. Culpepper responded:

> We had a letter agreement, Your Honor. A letter dated September 20, 2000 is attached to his lawsuit. The first paragraph of that as per our agreement handles this matter on a contingency fee basis of one-third of whatever additional property or money we can get for you. And he was agreeable to that because he could not afford to pay on any hourly basis, so he--and, in fact, in papers that are attached to his--to his answer, Your Honor, defendant's answer, he said Mr. Culpepper did this on a contingency fee basis, so there's no question about being an agreement. The, uh, disciplinary board found that there was a contingency fee contract.

When Mr. Cole took the stand on his own behalf, the court asked him if he had asked Mr. Culpepper for a contingent fee arrangement, to which Cole responded, "I asked for a contingency fee arrangement." The court asked Cole if Mr. Culpepper had explained to him that he would "try to get

whatever he could," and whether he explained to Cole why Cole did not need to go to court in the case. Cole responded:

> He told me, and I felt that, you know, we could go to court and I felt we could win if I had representation.

After hearing closing statements, the court concluded that the evidence showed a "contingency fee was present" based on the record, including attachments, letters, testimony in open court and the written admission in Cole's answer that there was a contingent fee arrangement. The court noted that the "work was accomplished" and further noted that, according to the testimony, the results obtained would have been better than if the case had gone to trial on the issue of forced heirship.[1] Thus, the court was satisfied that the plaintiff had met the burden of proof. This appeal followed.

DISCUSSION

On appeal, Cole essentially challenges the sufficiency of the evidence, asserts that the court's ruling did not allow Cole "the right to waive attorney," and argues that he never gave Culpepper authority to settle. The totality of Cole's argument in his appellate brief is contained in the following paragraph:

> There has not been any evidence or law to support the finding of the City Court of Ruston. If there is any evidence or law to support the findings then we ask they are made available to the appellant Connie C. Cole and the Appeals Court. There has been a misconstruction of appellant, Connie D. Cole's right to consult resulting in a denial of his right to waive which is what the case is about. The miscontruing is obvious as no written agreement or contract exists to substantiate this claim. This by an individual that makes his living drawing up

> contracts and agreements to specifics, attorney at law, Bobby L. Culpepper, appellee/plaintiff. The appellant, Connie Cole does not agree he ever at any time agreed that Mr. Culpepper could negotiate any amount and he would agree to pay for whatever settlement he had negotiated whether the appellant approved or not. The appellant has already pursued this case in two courts on his own initiative. This very case in controversy is awaiting to be decided in the appeals court as well.

Contingent Fee Agreement

The first issue we will address is whether the trial court correctly found a contingent fee contract. The provisions of La. R.S. 37:218(A) state:

> By written contract signed by his client, an attorney at law may acquire as his fee an interest in the subject matter of a suit, proposed suit, or claim in the assertion, prosecution, or defense of which he is employed, whether the claim or suit be for money or for property. Such interest shall be a special privilege to take rank as a first privilege thereon, superior to all other privileges and security interests under Chapter 9 of the Louisiana Commercial laws. In such contract, it may be stipulated that neither the attorney nor the client may, without the written consent of the other, settle, compromise, release, discontinue, or otherwise dispose of the suit or claim. Either party to the

[1]See *In re Succession of Annie Ruth Brown*, 39,035 (La. App. 2d Cir. 10/27/04), 886 So. 2d 633, wherein a panel of this court affirmed the trial court's determination that Cole failed to establish that the testator lacked testamentary capacity to execute her will.

> contract may, at any time, file and record it with the clerk of court in the parish in which the suit is pending or is to be brought or with the clerk of court in the parish of the client's domicile. After such filing, any settlement, compromise, discontinuance, or other disposition made of the suit or claim by either the attorney or the client, without the written consent of the other, is null and void and the suit or claim shall be proceeded with as if no such settlement, compromise, discontinuance, or other disposition has been made.

The fifth circuit interpreted and applied the writing requirement of 37:218(A) in *Tschirn v. Tschirn*, 570 So. 2d 204 (La. App. 5th Cir. 1990) , *writ denied*, 573 So. 2d 1123 (La. 1991), where there was an oral contingent fee contract, but no written contract. The court reasoned that the purpose of La. R.S. 37:218 is to protect the attorney, not to allow the client to deprive the attorney of his earned fee. The court concluded, therefore, that the absence of a written contingent fee contract does not necessarily render an otherwise binding oral contingent fee contract unenforceable and that the testimony of the attorney claiming the fees, plus general corroborating circumstances, are enough to prove that a contingent fee contract exists between the parties.

In 1997, after the contingent fee agreement in *Tschirn v. Tschirn, supra*, was confected, an amendment to Rule 1.5(c) of the Rules of Professional Conduct became effective which added a provision regarding contingent fee contracts. Rule 1.5(c) now states, in pertinent part:

> A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by Paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method

> by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; the litigation and other expenses that are to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated.

In *Tschirn v. Secor Bank*, 96-1992 (La. App. 4th Cir. 3/19/97), 691 So. 2d 1290, *writ denied*, 97-1416 (La. 9/19/97), 701 So. 2d 172, the fourth circuit acknowledged this amendment to Rule 1.5. The court, however, found an oral contingent fee agreement to be binding based on the testimony of the attorney and the client that the parties had agreed on a fee of one-third of any recovery after a reduction of costs paid by the client.[2]

In the case *sub judice*, we conclude that the sufficiency of the contingent fee agreement was admitted by Cole in three respects. First, Cole acquiesced in the contingent fee agreement through his silence upon receipt of Culpepper's letter and his participation in Culpepper's continued work on the matter. Cole attached to his answer a copy of the letter from Culpepper setting forth the contingent fee of one-third "of whatever additional property or money we can get for you." The letter further indicated that Cole would be responsible for paying all the court costs and had already advanced $250. Second, and as previously stated, Cole admitted in his written answer that Culpepper took the case on a contingent basis. Third, Cole testified in open court that he and Culpepper had agreed that the fee would be

[2]The court further held that, in cases where the contingent fee agreement is oral, any ambiguities in the agreement are to be construed against the attorney and in favor of the client.

determined on a contingent fee basis. In fact, during the trial, not only did Cole admit that he and Culpepper agreed to a contingent fee arrangement, but Cole stated that he ***asked*** Culpepper to take the case on contingency because he did not have the money to pay on an hourly basis. This testimony indicates that Cole was aware of the type of fee arrangement into which he was entering and understood how the fee would be determined and paid.

We consider the foregoing evidence sufficient to establish the existence of a binding oral contingent fee contract between Culpepper and Cole. See *Tschirn v. Secor Bank, supra.* Note that our finding herein is limited to the particular facts of this case, with the critical facts being Cole's acquiescence in the agreement, his written admission of the agreement in his answer and, finally, his repeated admission in open court that Culpepper took the case on a contingent basis and that Cole, in fact, asked for a contingent fee arrangement with Culpepper. Accordingly, we find no merit in Cole's allegation of insufficient evidence.

Next, we observe that, by enforcing the contingent fee contract, the court did not refuse to allow Cole "the right to waive attorney." Cole had a right to discharge his attorney and to represent himself; however, Cole did not have the right to deprive his attorney of the contingent fee that his attorney already had earned prior to discharge. As noted, the evidence indicated that Culpepper already had negotiated a favorable settlement for Cole prior to Culpepper's discharge, but Cole refused to sign the settlement agreement.

Finally, Cole argues on appeal that he never agreed that "Mr. Culpepper could negotiate any amount and [Cole] would agree to pay for whatever settlement [Culpepper] had negotiated whether [Cole] approved or not." Louisiana law provides that a party's counsel of record has authority to settle a client's claim only with the client's "clear and express

consent" to do so. *Frederic Hayes, Inc. v. Rollins*, 435 So. 2d 1151 (La. App. 3d Cir. 1983). In *Hayes*, on a record "totally devoid of any evidence demonstrating that the defendant ever consented in any manner whatsoever to the settlement confected" by his counsel, the third circuit found no error in the trial court's finding that there was no settlement of the defendant's claim.

By way of contrast, in *Lockette v. Greyhound Lines, Inc.*, 817 F. 2d 1182 (5th Cir. 1987), a Louisiana case, the plaintiff's counsel testified that the plaintiff had given him general authority to settle her case and had told him simply to "use his best judgment" in arriving at an appropriate settlement of her claim against Greyhound. Based on his testimony, the magistrate made the factual finding that express authority to settle the claim had been given. The Fifth Circuit did not disturb this finding, stating that the magistrate's factual determination that the client had given counsel the "express general authority" to settle was not clearly erroneous. The court in *Lockette* further found that the plaintiff's statements to her counsel to the effect that he was authorized to use his best judgment in settling her case "were sufficient under Louisiana law to constitute a grant of settlement authority." *Lockette, supra.*

Similar to *Lockette, supra*, in the case *sub judice*, Culpepper testified the Cole had authorized Culpepper "to work out the best settlement that we could work out." The trial court found this testimony credible and accepted the same and further noted that Culpepper then worked out a settlement and that Cole then refused to sign the settlement papers.[3] It

[3]Although Cole has not attacked the adequacy of the settlement on appeal, we note, as did the trial court, that the agreement negotiated by Culpepper was more favorable than the amount Cole would have received under a judgment finding him to be a forced heir and, as such, entitled to one-eighth of the estate.

is axiomatic that the trier of fact's decision on such credibility issues is entitled to great deference and will not be disturbed absent manifest error; we detect no such error in the trial court's decision. See *Rosell v. ESCO*, 549 So. 2d 840 (La. 1989).

Additional Attorney Fee Award

Although this suit was styled as a suit on open account, and despite the fact that the judgment was apparently rendered on that
basis, we note that counsel for Culpepper agreed during oral argument that the money owing in this case derives from a contractual obligation, i.e., a contingent fee contract, and is not, therefore, an open account as contemplated by La. R.S. 9:2781(A).

For this reason, the judgment herein is amended to delete the awarded to Culpepper of 25 percent additional attorney fees plus costs under La. R.S. 9:2781(A).

CONCLUSION

For the reasons set forth above, the judgment is hereby amended to delete that portion of the judgment awarding Culpepper & Carroll, PLLC, additional attorney fees of 25 percent for pursuit of the alleged open account. As amended, the remainder of the judgment is affirmed. Costs of appeal are assessed to Defendant/Appellant, Connie D. Cole.

AMENDED AND, AS AMENDED, AFFIRMED.

CARAWAY, J., dissenting

I respectfully dissent.

This case bears out the adage, hard facts make bad law. Certainly, there are hard facts evident from what appears to have been very good legal representation from Mr. Culpepper who has gone uncompensated for his services. Providing him compensation in a manner given by the majority, however, makes for bad law. This is bad law for the attorney/client relationship within contingent fee contracts and misconstrues the nature of such contracts and the rights of the attorney under the contract, thus missing well-established concerns for the regulation of the practice of law.

There are two glaring facts that somehow got lost in the lengthy reasoning of the majority. First, the ultimate "outcome of the matter" between Mr. Cole and his mother's estate has yielded him nothing. See *In re Succession of Brown*, 39,035 (La. App. 2d Cir. 10/27/04), 886 So. 2d 633 (where Mr. Cole represented himself *pro se* and lost after Mr. Culpepper's withdrawal). One-third times Mr. Cole's award or "outcome of the matter" is how the fee is mathematically calculated. The contingent part of the equation is the "outcome of the matter," and it never materialized in Mr. Cole's favor in this case. One-third times zero equals no contingency fee.

This is the clear precedent of the ruling in *Frederic Hayes, Inc. v. Rollins*, 435 So. 2d 1151 (La. App. 3d Cir. 1983). There, the client rejected a $30,000 settlement offer and received nothing. When the attorney sued for his one-third contingency fee equaling $10,000, the court said no such fee could be awarded because the contingency of a positive outcome to the client produced no award.

More importantly, the Louisiana Supreme Court and the lower courts have an inherent judicial power concerning the regulation of the practice of law which entails "the responsibility to exert control by adjudicatory means of

individual cases as they arise, including those relative to discharge of counsel and regulation of fees, whether by contingency contract or otherwise." *O'Rourke v. Cairns*, 95-3054 (La. 11/25/96), 683 So. 2d 697, 700; *Saucier v. Hayes Dairy Products, Inc.*, 373 So. 2d 102 (La. 1979). From the rules of professional conduct and the decisions of our supreme court, it is clear that an attorney with a contingency fee contract is never vested with an ownership or proprietary interest in the cause of action or subject matter of the litigation. Rules of Professional Conduct, Rule 1.8(i); *Saucier, supra; Scott v. Kemper Ins. Co.*, 377 So. 2d 66 (La. 1979). To avoid offending the disciplinary rules regarding discharge of counsel (Rule 1.16) and the client's direction of the representation and settlement (Rule 1.2a), the court in *Saucier* limited the contingency fee interest of the attorney to "no more than a *privilege* granted to aid the attorney's collection of a fully-earned fee out of the *fund* which the satisfaction of the client's claim yields. *Id.* at 117 (emphasis added). Louisiana privileges attach primarily to a specific thing or fund. La. C.C. Art. 3189; *Republic Supply Co. v. Carthay Land Co.*, 244 So. 2d 241 (La. App. 4th Cir. 1971). There is nothing for Mr. Culpepper's privilege to attach to in this case because Mr. Cole never recovered an award or fund for the satisfaction of his claim against his mother's estate. To allow the attorney an ownership interest in a settlement rejected by the client, and to then translate that ownership interest into a personal money judgment against the client who recovered nothing, ignores multiple and serious concerns embodied in the rules of professional conduct.

Second, Mr. Culpepper's lengthy letter of September 20, 2000, provides a commendable discussion and assessment of the claim to his client, and it certainly gives a written basis for the parties' agreement for a one-third contingency fee contract as found by the majority. Yet, the discussion of the difficult legal matters of forced heirship and succession law and Mr. Culpepper's assessment of the values of the estate

and the estimated $22,900 maximum recovery leave much room for the lay person to be confused or to disagree. Recognizing this and properly following Rule 1.2(a), Mr. Culpepper concluded the letter by conceding to Mr. Cole "[w]e need to think about all this and see what you would be willing to do." Clearly, Mr. Cole was never willing to settle for the $21,600.03 offer which Mr. Culpepper skillfully obtained. Therefore, the majority is mistaken in relying on Mr. Culpepper's stated belief that he was authorized to work out the best settlement possible. Honoring the rules of professional conduct, Mr. Culpepper, appropriately, never felt comfortable in signing a settlement release for his client and cashing the $21,600.03 settlement check. If he had clear and express unilateral authority from his client to settle for $21,600.03, this suit to collect his fees would never have occurred.

The hard fact of this case, as indicated above, is that Mr. Culpepper may very well have obtained a more valuable settlement proposal than any outcome Mr. Cole could ever have received after a court's judgment. Mr. Cole appears imprudent for rejecting the settlement. He certainly has not exhibited even an elementary understanding of the complicated nature of his claims. But these things sometimes occur in an attorney/client relationship, and the disappointing risk of a client who dooms any possibility for a positive outcome for the matter is one of the reasons why this is called a contingency fee relationship. As the court concluded in *Hayes, supra*, other remedies may be available to compensate the attorney for his actual services, and I would remand to allow consideration of another theory of recovery for Mr. Culpepper.

Finally, as indicated above, the law of this case will now be applicable to any contingency fee contract, and the appearance of impropriety to the public will be significant. For example, an attorney might advise a client in a similar

assessment/contingency fee letter that the expected range of recovery of his personal injury claim is between $10,000 and $50,000. The attorney could strongly recommend in the letter that any settlement offer of $30,000 be accepted immediately, yet conclude to the client that he needs "to think about all this and see what you would be willing to do." Immediately after filing such a personal injury suit, if a $30,000 settlement is offered, the attorney may, under this ruling, withdraw from representation and obtain a personal judgment against the client for a one-third fee or $10,000, for the client's refusal to settle. Thereafter, when the client proceeds to trial and receives a verdict granting a low award of $10,000 in damages, the client must use that entire award to pay his former attorney. This problem picture can be further exacerbated if we assume that the hypothetical attorney expended only $1,000 worth of fees measured on an hourly basis before he decided to withdraw from the case. This is the broad implication of the majority's ruling. It violates the regulation of the practice of law for the contingency fee relationship as addressed in *Saucier*, and I respectfully dissent.

SUPREME COURT OF LOUISIANA
NO. 05-C1136

CULPEPPER & CARROLL, PLLC
V.
CONNIE D. COLE

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL,
SECOND CIRCUIT, PARISH OF LINCOLN,
STATE OF LOUISIANA

PER CURIAM

Connie Daniel Cole seeks review of a judgment of the court of appeal affirming an award of attorney's fees to his former counsel. For the reasons that follow, we reverse the judgment of the court of appeal.

FACTS AND PROCEDURAL HISTORY

Connie Daniel Cole retained attorney Bobby Culpepper of the law firm of Culpepper & Carroll, PLLC to represent him in a contest of his mother's will. Mr. Cole requested that the firm handle the matter on a one-third contingency fee basis, and Mr. Culpepper agreed to do so. On September 20, 2000, Mr. Culpepper sent Mr. Cole a letter in which he confirmed that he would accept the representation on a contingent fee basis of one-third "of whatever additional property or money we can get for you."

After negotiation between Mr. Culpepper and counsel for the estate of Mr. Cole's mother, Mr. Cole was offered property worth $21,600.03 over and above what he would have received under the terms of the decedent's will. Mr. Culpepper thought the compromise was reasonable and recommended to Mr. Cole that he accept the offer.

However, Mr. Cole refused to settle his claim for that amount, believing he was entitled to a larger share of his mother's succession as a forced heir. When Mr. Culpepper refused to file suit in the matter, Mr. Cole terminated his representation. Mr. Cole then proceeded in proper person to challenge his mother's will, but he was unsuccessful and recovered nothing.[1]

On April 12, 2004, Mr. Culpepper filed "Petition on Open Account" on behalf of the Culpepper law firm. The suit was filed in Ruston City Court against Mr. Cole, seeking the sum of $6,950.01,[2] plus legal interest, together with 25% on the principal and interest as additional attorney's fees and a demand letter to Mr. Cole seeking the payment of "the entire balance of $6,950.01 that you owe Culpepper & Carroll, PLLC."

Mr. Cole, appearing in proper person, answered the law firm's petition and denied that he owed any money. Mr. Cole explained in his answer that "Mr. Culpepper did this on a contingency fee basis," that Mr. Culpepper "quit the case," and that Mr. Cole paid court costs but Mr. Culpepper "would not go to court."

Following a trial on the merits, at which both parties testified, the city court rendered judgment in favor of the law firm, awarding the sum of $6,950.01, plus legal interest from the date of judicial demand until paid, together with 25% on the principal and interest as additional attorney's fees, and

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[1] See *Succession of Brown*, 39,035 (La. App. 2nd Cir. 10/27/04), 886 So. 2d 633, *writ denied*, 05-0030 (La. 3/18/05), 896 So. 2d 1006.

[2] This sum represents one-third of the $21,600.03 in property Mr. Cole would have received had he accepted Mr. Culpepper's settlement recommendation, less a credit of $250 for costs paid by Mr. Cole in advance.

costs. In oral reasons for judgment, the city court judge stated that a "contingency fee was present" based on the record, including the testimony in open court and the written admission in Mr. Cole's answer that there was a contingent fee agreement. The court noted that "work was accomplished" by Mr. Culpepper and further noted that, according to the testimony, the settlement would have produced a better result than if the case had gone to trial on the issue of forced heirship. Thus, the court was satisfied that the law firm met its burden of proof.

Mr. Cole appealed the city court's judgment, and in a 2-1 ruling, the court of appeal amended the judgment and affirmed. *Culpepper & Carroll, PLLC v. Cole*, 39,438 (La. App. 2nd Cir. 3/9/05), 896 So. 2d 341. The majority agreed that a valid contingent fee contract existed between Mr. Cole and Mr. Culpepper, and found that by refusing to sign the "favorable settlement" negotiated by Mr. Culpepper before he was discharged, Mr. Cole was in effect depriving Mr. Culpepper of the contingent fee he had already earned. Accordingly, the court of appeal affirmed the award to Mr. Culpepper of $6,950.01 in attorney' fees, plus legal interest. However, the court of appeal found that the money owing in this case does not derive from an open account, but rather from a contractual obligation in the form of a contingent fee agreement. Based on this reasoning, the court of appeal amended the trial court's judgment to delete the award to the law firm of 25% additional attorney's fees plus costs under the open account statute.

Judge Carraway dissented. He recognized that a contingent fee contract existed in this case, but found that because there was ultimately no recovery in the case, no fee was due to Mr. Culpepper. Judge Carraway further observed that to allow an attorney to collect a fee when the client rejects a settlement offer and later recovers nothing "ignores multiple

and serious concerns embodied in the rules of professional conduct."

Upon Mr. Cole's application, we granted certiorari to review the correctness of the court of appeal's ruling. *Culpepper & Carroll, PLLC v. Cole*, 05-1136 (La. 6/24/05), 904 So. 2d 746.

DISCUSSION

As a threshold matter, we note the trial court made a finding of fact that a contingent fee contract existed between Mr. Cole and Mr. Culpepper. Based on our review of the record, we find no manifest error in this determination.

Having found a contingent fee contract exists, we now turn to the question of whether Mr. Culpepper is entitled to recover any attorney's fees under this contract. Pursuant to the parties' agreement, Mr. Culpepper is entitled to one-third "of whatever additional property or money" he obtained on behalf of Mr. Cole. It is undisputed that Mr. Cole recovered no additional property or money as a result of the litigation against his mother's estate. Because Mr. Cole obtained no recovery, it follows that Mr. Culpepper is not entitled to any contingent fee.[3]

Nonetheless, Mr. Culpepper urges us to find that his contingency should attach to the settlement offer he obtained on behalf of his client, even thought his client refused to accept that offer. According to Mr. Culpepper, he did the work for which Mr. Cole retained him, and he is therefore entitled to one-third of the amount offered in settlement, notwithstanding Mr. Cole's rejection of the settlement offer.

[3]As Judge Caraway aptly observed, "One-third of zero equals no contingency fee." His mathematic acumen is impeccable in this instance.

With the benefit of hindsight, it would have been in Mr. Cole's best interest to accept the settlement offer obtained by Mr. Culpepper. However, it is clear that the decision to accept a settlement belongs to the client alone. See Rule 1.2(a) of the Rules of Professional Conduct ("A lawyer shall abide by a client's decision whether to settle a matter."). Therefore, regardless of the wisdom of Mr. Cole's decision, his refusal to accept the settlement was binding on Mr. Culpepper.

To allow Mr. Culpepper to recover a contingent fee under these circumstances would penalize Mr. Cole for exercising his right to reject the settlement. We find no statutory or jurisprudential support for such a proposition. Indeed, this court has rejected any interpretation of the Rules of Professional Conduct which would place restrictions on the client's fundamental right to control the case. See, e.g., *Saucier v. Hayes Dairy Prods., Inc.*, 373 So. 2d 102 (La. 1979) (on rehearing) ("But the Disciplinary Rule implicitly recognizing the client's absolute right to discharge his attorney is stripped of effect if the client's exercise of that right is conditioned upon his payment of the full amount specified in the contract.").

In summary, we find that Mr. Culpepper did not obtain any recovery on behalf of Mr. Cole. In the absence of a recovery, it follows that Mr. Culpepper cannot collect a contingent fee for his services.4 Accordingly, we must reverse the judgment of the court of appeal awarding a contingent fee to Mr. Culpepper.

DECREE

For the reasons assigned, the judgment of the court of appeal is hereby reversed. All costs in this court are assessed against plaintiff.

4As an alternative to his claims under the contingent fee contract, Mr. Culpepper also seeks attorney's fees under the theory of quantum meruit. Because there was no recovery by the client, it follows there is no basis for quantum meruit recovery. See generally *O'Rourke v. Cairns*, 95-3054 (La. 11/25/96), 683 So. 2d 697; *Saucier v. Hayes Dairy Prods., Inc.*, 373 So. 2d 102 (La. 1979) (on rehearing).

SUPREME COURT OF LOUISIANA

FOR IMMEDIATE RELEASE NEWS RELEASE #034

FROM: CLERK OF THE SUPREME COURT OF LOUISIANA

On the 23rd day of June, 2006, the following action was taken by the Supreme Court of Louisiana in the case(s) listed below:

REHEARING(S) DENIED:

2003-KA-3067 STATE OF LOUISIANA V. MICHAEL WEARY (Parish of Livingston) JOHNSON, J., would grant a rehearing.
WEIMER, J., would grant rehearing in part and assigns reasons.

2005-CA-0612 C/W LLOYD BADEAUX AND LAURA M. BADEAUX V. SOUTHWEST COMPUTER BUREAU, INC. (Parish of Ascension)
2005-CA-0719 Retired Judge Robert J. Klees, assigned as Associate Justice Ad Hoc, for Chief Justice Pascal R. Calogero, recused; and Retired Judge Lemmie O. Hightower, assigned as Associate Justice Ad Hoc, for Associate Justice John L. Weimer, recused.

2005-K-0964 STATE OF LOUISIANA V. JACK S. SPEARS (Parish of Lincoln)

2005-C-1136 CULPEPPER & CARROLL, PLLC V. CONNIE D. COLE

2005-B-1736 IN RE: JOEL G. PORTER (Disciplinary Board)

REHEARING(S) NOT CONSIDERED:

2004-OB-1819 IN RE: LILIANA G. ROJAS

2004-OB-2364 IN RE: VALENTINA LAMONT